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October 19, 2015

BY ECF

Honorable Paul G. Gardephe
United States District Judge
Southern District of New York
United States Courthouse
40 Foley Square, Room 2204
New York, New York 10007

**Re: Acevado, et al v. Citibank, N.A.
Case No. 10 CV 8030 (PGG)**

Dear Judge Gardephe:

We are counsel for defendant Citibank, N.A. (“Citibank”). We write to respond to Plaintiffs’ October 12, 2015 letter opposing Citibank’s request for a pre-motion conference. See Doc. # 94. Our purpose is simply to correct the Plaintiffs’ misrepresentation of the procedural history of this case

A. Citibank has argued since 2010 that the amount in controversy does not meet the CAFA threshold and that any dispute is subject to binding arbitration

By their letter Plaintiffs attempt to portray Citibank as having unreasonably delayed in interposing the defenses of lack of subject matter jurisdiction and arbitrability. Plaintiffs’ argument that “Defendant has had multiple prior opportunities to raise jurisdictional issues, or move to compel arbitration” incorrectly suggest that this is the first

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first time Citibank raised these issues. Plaintiffs conveniently ignore that both issues were raised head-on early in the action. Citibank's December 30, 2010 pre-motion letter notified this Court and Plaintiffs of Citibank's intent to file a motion to dismiss on the basis of, inter alia, lack of subject matter jurisdiction. Plaintiffs similarly ignore Citibank's February 25, 2011 pre-motion letter in which Citibank notified this Court and Plaintiffs of its intent to file a motion (i) to dismiss based on lack of subject matter jurisdiction and (ii) seeking to compel arbitration. Lastly and even more egregious Plaintiffs ignore Citibank's subsequent motion to dismiss which asserted both of these grounds. See Doc. # 11, 14-20, 28-31.

As Your Honor may recall Citibank's motion was partially granted by order dated March 23, 2012 dismissing the Amended Complaint to the extent it asserted common law causes of action and sought monetary damages. See Doc. # 34.¹ The Court then invited the parties to address whether equitable relief was also barred and the Amended Complaint was subsequently dismissed in its entirety by order dated March 20, 2013. See Doc. # 49

¹ The Court accepted Citibank's argument and evidence that subject matter jurisdiction did not exist but as "Plaintiffs seek more in the Amended Complaint than simply the return of fees, however" ... "the Court cannot say to a "legal certainty" that the amount in controversy is less than \$5,000,000" and denied that portion of Citibank's motion to dismiss based on lack of subject matter jurisdiction. The Court noted that "in addition to compensatory damages, Plaintiffs seek 'statutory, exemplary and punitive damages' and an injunction '[p]ermanently enjoining [Citibank] from continuing to engage in the unlawful and inequitable conduct alleged herein and requiring [Citibank] to comply with [the] EIPA.'" See Doc. # 34, pp 5-6. The Second Amended Complaint does not seek such broad relief.

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Moreover it was not until September 22, 2015 that Plaintiffs finally filed its Second Amended Complaint. Between March 20, 2013 and September 22, 2015, Citibank simply had no complaint to address.

B. Limited discovery is not warranted

Equally there is no basis to afford Plaintiffs discovery on the subject matter jurisdiction issue. While Plaintiffs do not indicate what discovery they would seek, there is little doubt that it would be time-consuming and is unnecessary. When this Court last reviewed Citibank's submissions on the amount in controversy it denied that portion of Citibank's motion to dismiss based on lack of subject matter jurisdiction because the extant complaint sought statutory, exemplary and punitive damages as well as broad injunctive relief. Plaintiffs no longer seek such relief. The relief potentially available to a putative class member is limited to the return of a fee which was at most \$125. Thus even if class action treatment were granted, as demonstrated in the previous motion the minimum threshold of \$5,000,000 under CAFA is simply beyond any amount that could be recovered.

C. Citibank has sought to compel arbitration since 2010 and certainly has not "waived" arbitration

Plaintiffs argue that Citibank's "failure to raise this argument [arbitration] prior to this point should be deemed a waiver of this argument and it should not be

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entertained.” As noted above, Citibank sought to compel arbitration since its letter-request and a motion to compel arbitration in early 2011. See Doc. # 11, 14-20, 28-31.

The passage of time and any ensuing activity in this case is by virtue of Plaintiffs’ refusal to present a pleading alleging a cognizable claim since the dismissal of the Amended Complaint in March of 2013 after which Plaintiffs filed the Second Amended Complaint on September 22, 2015.² Plaintiffs rely upon one case to assert waiver, however that case is inapposite. There it was the plaintiffs who changed course after litigating at length and plaintiffs moved to compel arbitration when the case appeared to be at risk of dismissal. See La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 626 F.3d 156, 158 (2d Cir. 2010). That is clearly not the case here.

Moreover Citibank’s basis to compel arbitration as against plaintiff Acevado is based in part on new facts. In April, 2015 Plaintiff Acevado entered into a new arbitration agreement with Citibank agreeing to arbitrate any claim or dispute between the parties, “and agreed [] that the arbitration of such claims must proceed on an individual (non-class, non-representative) basis.”

² While Citibank argued that prior amended complaints were futile, the Court previously determined that submission of declarations in opposition a motion to interpose an amended complaint was “improper.” See Doc # 81, p. 15, N 6. Thus there was no complaint against Citibank and Citibank could not have argued for arbitration in opposition to interpose an amended complaint.

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Finally, Plaintiffs argue that the arbitration clauses at issue are unenforceable, citing Nat'l Supermarkets Assoc. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.), 634 F.3d 187, 196 (2d Cir. 2011), however this decision was reversed by the U.S. Supreme Court in Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312, 186 L. Ed. 2d 417 (2013) as recognized by the Second Circuit in Sutherland v. Ernst & Young LLP, 726 F.3d 290, 293 (2d Cir. 2013) ("Because Italian Colors abrogated the District Court's basis for invaliding the class-action waiver provision in this case, we conclude that the District Court erred in denying E&Y's motion to compel arbitration") Id. The Supreme Court's Italian Colors decision held that a class action waiver must be enforced even when the plaintiff is seeking class relief noting that it "merely limits arbitration to the two contracting parties." Plaintiffs' respective agreements to arbitrate their disputes with Citibank are patently enforceable in light of the Supreme Court's recent decisions.

Therefore Citibank respectfully requests a pre-motion conference to discuss these issues and arrange a briefing schedule.

Respectfully submitted,



Tracee E. Davis

cc: All counsel by ECF